No. 74 and No. 93

In The

Supreme Court of the United States

October Term, 1963

UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION, and SOUTHERN RAILWAY COMPANY, Appellants

v.

STATE OF NORTH CAROLINA; DUKE UNIVERSITY; THE DURHAM CHAMBER OF COMMERCE, INC.; RESEARCH TRIANGLE INSTITUTE; ERWIN MILLS, INC.; and MARY TRENT SEMANS, Appellees

On Appeal From the United States District Court for the Middle District of North Carolina

BRIEF FOR THE APPELLEES STATE OF NORTH CAROLINA; DUKE UNIVERSITY; THE DURHAM CHAMBER OF COMMERCE, INC.; RESEARCH TRIANGLE INSTITUTE; ERWIN MILLS, INC.; and MARY TRENT SEMANS

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OPINION BELOW

The opinion of the District Court (R. 634) is reported at 210 F. Supp. 675. The report of the Interstate Commerce Commission (R. 10) is reported at 317 I.C.C. 255. The report and recommended order of the Commission's Hearing Examiner appear at R. 25.

JURISDICTION

This suit was brought by appellees under 28 U.S.C. Sec. 1336, 1398 and 2321-2325 to set aside an order of the Interstate Commerce Commission. Hearing was held before a three-judge court convened under 28 U.S.C. Sec. 2284. The judgment of the District Court in setting aside the Commission's order and permanently enjoining appellant from

acting thereunder was entered on October 19, 1962. On December 14, 1962, a notice of appeal to this Court was filed in the District Court.

The jurisdiction of this Court to review the decision below is conferred by 28 U.S.C. Sec. 1253 and 2101 (b). This Court noted probable jurisdiction of the appeal on May 13, 1963.

QUESTIONS PRESENTED

1. Does Section 13a(2) of the Interstate Commerce Act empower the Interstate Commerce Commission to discontinue the operation of an intrastate passenger train which is operated at a deficit without the Commission taking into consideration the freight profits of that particular line and its over-all profits?

2. Did the District Court correctly conclude that the decision of the Interstate Commerce Commission ordering the discontinuance of the trains involved was not in accordance with law and not supported by substantial evidence?

STATUTE INVOLVED

Section 13a(2) of the Interstate Commerce Act. 72 Stat. 472. 49 U.S.C. Sec. 13a(2), reads as follows:

> "Where the discontinuance or change, in whole or in part, by a carrier or carriers subject to this part of the operation or service of any train or ferry operated wholly within the boundaries of a single State is prohibited by the constitution or statutes of any State or where the State authority having jurisdiction thereof shall have denied an application or petition duly filed with it by said carrier or carriers for authority to discontinue or change, in whole or in part, the operation or service of any such train or ferry or shall not have acted finally on such an application or petition within one hundred and twenty days from the presentation thereof, such carrier or carriers may petition the Commission for authority to

effect such discontinuance or change. The Commission may grant such authority only after full hearing and upon findings by it that (a) the present or future public convenience and necessity permit of such discontinuance or change, in whole or in part, of the operation or service of such train or ferry and (b) the continued operation or service of such train or ferry without discontinuance or change, in whole or in part, will constitute an unjust and undue burden upon the interstate operations of such carrier or carriers or upon interstate commerce.***"

STATEMENT

On July 8, 1959, Southern Railway Company (hereinafter called Southern) filed a petition with the North Carolina Utilities Commission for an order permitting it permanently to discontinue the operation of passenger trains 13 and 16 between Greensboro and Goldsboro, North Carolina. Actually, only one train is involved, it being designated No. 16 in one direction and No. 13 on the return trip. This train furnishes the last remaining railway passenger service between these two towns, all previous passenger trains having been discontinued by Southern. Following numerous protests and a hearing, the State Utilities Commission denied the petition, and Southern appealed to the Wake County, North Carolina, Superior Court, which upheld the Utilities Commission's order. Southern then appealed to the North Carolina Supreme Court which affirmed the Superior Court and the Utilities Commission, in a unanimous decision handed down February 3, 1961. *State of North Carolina, ex rel, Utilities Commission, et al, v. Southern Railway Company*, 254 N.C. 73, 118 S.E. 2nd 21 (1961).

On April 6, 1961, Southern filed a petition with the Interstate Commerce Commission (Finance Docket No. 21563) again seeking authority to discontinue the operation of these trains pursuant to the provisions of Section 13a(2) of the Interstate Commerce Act. The I.C.C. referred the petition to William J. Gibbons, Hearing Examiner, who held a hearing at Raleigh, North Carolina, July 11, 1961, through July 14, 1961.

On October 27, 1961 (service date) the Examiner filed his report together with the recommendation that the I.C.C. issue an order allowing Southern's petition. (R. 24-42).

Exceptions to the Examiner's report and recommended order were duly filed by all of the appellees herein, and the matter was referred to Division 3 of the I.C.C.

By order bearing service date of July 2, 1962, Division 3 adopted the rulings, findings and conclusions of the hearing Examiner. This order authorized Southern to discontinue the operation of the passenger trains in question.

Then, on August 18, 1962, this action was instituted by appellees in the United States District Court to set aside the Interstate Commerce Commission's order, as previously mentioned.

Southern operates two deficit-producing passenger trains between Greensboro and Goldsboro, North Carolina. The distance between the two points is 129.1 miles. Train No. 16 operates eastbound in the morning from Greensboro to Goldsboro, and Train No. 13, consisting of the same equipment, operates in the reverse direction in the late afternoon. (R. 73).

The Examiner found that the operation of the trains resulted in a net loss to Southern and that the discontinuance of the passenger service would result in annual savings "considerably in excess of $90,589 a year" (R. 39). He also found that the public demand for the service was slight, and had sharply declined since 1948, despite the high density of population in the area traversed by the two trains. Thus, in 1948 both trains carried 56,739 passengers, an average of 77.51 per trip, compared to 14,776 passengers in 1960 or an average of 20.19 per trip (R. 31). The Examiner found that adequate alternative means of transportation were available to the public. Based upon these findings, the Examiner concluded that the present and future public convenience and necessity permit the discontinuance of passenger trains 13 and 16 and that the continued operation of the trains would constitute an unjust and

undue burden on the Southern's interstate operations and upon interstate commerce. Accordingly, he recommended that the petition be granted (R. 42).

Upon the filing of exceptions and replies to the Examiner's report, the matter was considered by Division 3 of the Commission, consisting of three Commissioners. The Division issued a report dated June 27, 1962 (R. 10) in which it set forth its views on the issues raised by the exceptions and also adopted the findings and conclusions of the Examiner. The Division further found (R. 17):

> "From a review of the evidence of record we conclude that the cost to the carrier of operating the trains involved greatly exceeds the benefit derived from said trains by the traveling public; that existing alternate transportation service by rail, bus, airline and motor truck are reasonably adequate for the transportation of passengers, and express; that the public will not be materially inconvenienced by the discontinuance of the service here involved; that the savings to be realized by the carrier outweigh the inconvenience to which the public may be subjected by such discontinuance; that such savings will enable the carrier more efficiently to provide transportation service to the public which remain in substantial demand; and that the continued operation of trains Nos. 13 and 16 would constitute a wasteful service and would impose an undue burden on interstate commerce."

A petition seeking reconsideration by the entire Commission was denied on August 6, 1962. At the same time, it was provided that the order of the Commission authorizing the discontinuance of passenger trains 13 and 16 (which had been postponed pending disposition of the petition) should become effective 15 days after August 8, 1962 (R. 20-21).

On August 18, 1962, the State of North Carolina and other protestants instituted an action in the district court seeking to set aside and enjoin the order of the Commission. There-

after, on October 19, 1962, the three-judge court issued its opinion and decree (R. 634). The decree (1) set aside and enjoined the Commission's order; (2) required the Southern to reinstate the service which had been discontinued pursuant to the Commission's order, and (3) "permanently and perpetually enjoined and restrained (the Southern) from discontinuing passenger trains, Nos. 13 and 16, between Greensboro and Goldsboro, North Carolina" (R. 658).

The Court stated in its opinion that, "This court is specifically authorized by the Administrative Procedure Act (5 U.S.C.A. 1009) to 'hold unlawful and set aside agency action findings and conclusions found to be arbitrary, capricious . . . or otherwise not in accordance with law . . . (or) unsupported by substantial evidence.' By the provisions of Title 28, sec. 1336, jurisdiction is accorded to 'set aside (or) annul any order of the Interstate Commerce Commission.' Pursuant to this authority, we hold unlawful and set aside the action of the Interstate Commerce Commission authorizing the carrier to abandon its passenger service. We also hold unlawful and set aside the ultimate conclusions of the Interstate Commerce Commission that the service in question constitutes an undue burden on interstate commerce and that the present or future public convenience and necessity permits such discontinuance. We hold that such action and conclusions are arbitrary and capricious because not in accordance with law and because not supported by substantial evidence." (R. 656-657)

SUMMARY OF ARGUMENT

One of the questions involved in this matter turns on the interpretation of Section 13a(2) of the Transportation Act of 1958 insofar as that section governs the discontinuance of intrastate passenger trains wholly within the boundaries of a single State. Section 13a(2) empowers the Commission to order the discontinuance of a "train" operated "wholly within the boundaries of a single State" if the state has first refused permission or failed to act upon an application within 120 days, and if the Commission, after a public hearing, finds (1)

that discontinuance of the train is consistent with the present or future public convenience and necessity, and (2) that the continued operation of the train will constitute an unjust and undue burden upon the interstate operations of the carrier or upon interstate commerce.

In enacting Section 13a(2) Congress did not intend that interstate railroads might discontinue loss-producing intrastate passenger trains which are operated at a deficit without the Commission taking into consideration the freight profits of that particular line and its over-all profits.

That in enacting Section 13a(2) Congress did not intend that the Interstate Commerce Commission should make a finding or issue an order which is not warranted in law, or is not based upon substantial evidence in the record. The conclusions drawn by the Court below were that such actions and conclusions of the Interstate Commerce Commission "are arbitrary and capricious because not in accordance with law and because not supported by substantial evidence." (R. 656-657).

ARGUMENT

I.

SECTION 13a(2) OF THE INTERSTATE COMMERCE ACT DOES NOT EMPOWER THE INTERSTATE COMMERCE COMMISSION TO DISCONTINUE THE OPERATION OF AN INTRASTATE PASSENGER TRAIN WHICH IS OPERATED AT A DEFICIT WITHOUT THE COMMISSION TAKING INTO CONSIDERATION THE FREIGHT PROFITS OF THAT PARTICULAR LINE AND ITS OVER-ALL PROFITS.

The Hearing Examiner and the Interstate Commerce Commission based their conclusion that the continued operation of these last passenger trains would constitute an unjust and undue burden upon the interstate operations of Southern and upon interstate commerce solely on Southern's evidence that

the two trains operated at a net financial loss. The over-all soundness of the railroad and its lucrative freight operations over this same line were totally disregarded. In the Examiner's report appears the following:

> "At the hearing, protestants emphasized the fact that petitioner's net railway operating income in 1960 was $36,107,599, and that its net income alone from freight operations on the line between Greensboro and Goldsboro averages $630,000, thus contending that the over-all prosperity of the petitioner, as well as its intrastate freight operations, must be given effect in the disposition of the issues involved herein. With these contentions, the Examiner disagrees." (R. 37-38)

Division 3 of the Interstate Commerce Commission followed the Examiner's position and repeated the rule as follows:

> "Nowhere in Section 13a(2) or elsewhere in the law is there any requirement that the prosperity of the intrastate operations of the carrier as a whole, or any particular segment thereof must be given effect in determining whether the operation of an individual intra-state train imposes an unjust and undue burden on interstate commerce. To hold otherwise would be contrary to the apparent intent of the Congress." (R. 14)

On appeal the three-judge District Court took a different view. The Court stated:

> "The Examiner and the ICC have misconstrued the intent of Congress and the contentions of the plaintiffs, as well as the applicable law. It is a non-sequitur to say that 'by analogy, interveners' plaintiffs view would require a determination that overall losses have resulted on traffic handled over the line.' Plaintiffs do not contend—and it is not the law—that there can be no discontinuance unless freight and passenger service considered together show a net loss. Rather, plaintiffs' contention is that the $630,000 freight profit is a factor to be

considered in determining whether the $90,000 passenger loss on the same line constitutes an unjust and undue burden on interstate commerce. Whether there is a net profit or net loss is not necessarily the controlling factor, but the amount of the net profit or net loss is a factor to be considered. Whether the operation of the passenger service is a burden on interstate commerce and whether there is any longer a public need sufficient to justify the financial losses involved are questions not susceptible of scientific measurement or exact formulae but are questions of degree and involve the balancing of conflicting interests. All material factors bearing on the questions must be taken into account, the ICC must consider a fair picture. Because Congress has expressed concern over the financial conditions of railway passenger service does not justify a reading of their intent to mean that if a segment of passenger service shows a loss, it is unnecessary to consider all other relevant factors, including the freight profits on the same line, to determine whether the loss constitutes a burden on interstate commerce.

"We hold, then, that the Commission should have considered the relative amount of profit on one service and loss on the other in making its finding of whether the passenger service here involved constituted an undue burden on interstate commerce." (R. 646-647)

It is respectfully submitted that the three-judge District Court's interpretation is correct; that the Hearing Examiner was not correct; and that the over-all prosperity of the carrier and the total operations of the carrier on the line involved should have been considered.

At the time Section 13a(2) was adopted in 1958 railroads in general were in financial difficulty throughout the country. Part of this difficulty resulted from passenger operation deficits. Apparently, Congress felt there was some danger that local state commissions might be reluctant to grant discontinuances of trains due to local prejudice; it therefore felt that some control by a Federal regulatory body should be in

the law over intrastate operations. (See 1958 U. S. Code Cong. and Adm. News, Vol. 2, p. 3456). However, Congress did not delegate this authority exclusively to the Interstate Commerce Commission. It required railroads first to apply to the state commission and then laid down careful prerequisites for the guidance of the Interstate Commerce Commission before they could reverse the decision of the State regulatory body. The words "unjust" and "undue" clearly indicate that Congress intended that the mere fact that a particular part of the operation was operating at a loss would not justify discontinuance of the train itself. If there is a burden, it must be "unjust", and it must be "undue". It is submitted that in order to determine whether a particular burden is undue or unjust the over-all situation of the railroad and especially the entire operations of the railroad over the particular line must be considered. In this light we find the following undisputed facts from Southern's own witness:

1. The maximum loss claimed by Southern on these two passenger trains for 1960 is $117,641 before allowing any deductible loss for Federal and State income taxes. It is only $49,408.82 after allowing a 52% deduction for Federal income tax and a 6% deduction for State income taxes. (R. 365).

2. On this same line of tract the railroad in 1960 made a net freight operating profit of $630,000. (R. 374).

3. The over-all profit of Southern Railway in 1960 for its entire system was $36,107,599 after the payment of all taxes and all operating expenses. (R. 132-330).

Our position in this respect is supported by the case of *Chicago Milwaukee St. P. & P. Railroad Company vs. Illinois*, 355 U.S. 300 2 L. Ed. 2d 292, 78 S. Ct. 304 (1958). This case involved a decision made by the Interstate Commerce Commission under 49 USC Sec. 13(4) which authorized the ICC to prescribe intrastate fares if it found that ". . . any such (existing intrastate) fare . . . causes . . . any undue, unreasonable or unjust discrimination against interstate . . .

commerce." The interstate Commerce Commission had found that the Milwaukee road's 1954 passenger revenues from the Chicago suburban commuter service involved fell short by $306,038.00 of meeting the out-of-pocket cost of the service. On this basis the ICC concluded that the existing intrastate fare caused undue discrimination against interstate commerce and prescribed fares to produce enough additional annual revenue to eliminate the out-of-pocket expense. The State of Illinois brought suit to change the ICC order. In reversing the ICC ruling this Court stated:

> "This case presents once again the problem of adjusting state and federal interests in the regulation of intrastate rates. *These intrastate rates are primarily the State's concern and federal power is dominant 'only so far as necessary to alter rates which injuriously affect interstate transportation'* . . . Thus, whenever this federal power is exerted within what would otherwise be the domain of the state power the justification for its exercise must *'clearly appear'* . . . The statute provides a practical method of minimizing the inevitable irritations inherent in the conflict by requiring the ICC to notify the State whenever there is brought before it any fare imposed by state authority. In addition, the ICC may confer with the state regulatory authority or may hold joint hearings with the state agency when the State's rate-making authority may be affected by the action taken by the ICC. 49 USC §13(3).
>
> . . . In the instant case the ICC interfered with suburban commuter rates—intrastate rates peculiarly localized in impact upon the Chicago suburban community. In substance, the ICC found that because this single segment of the Milwaukee Road's intrastate operations in Illinois did not meet out-of-pocket costs, there was an undue discrimination against the road's interstate operations, without regard to the contribution of other Illinois intrastate revenues, freight or passenger, concerning which both the record and the findings are entirely silent.

"We think this is a case where the ICC cannot be sustained in altering intrastate rates merely because the Chicago suburban commuter traffic—of the Milwaukee Road's total intrastate traffic, freight and passenger—is not remunerative or reasonably compensatory . . . *The limited and exceptional power asserted by §13(4) over intrastate rates must be exercised with 'scrupulous regard for maintaining the [primary] power of the state in this field'* . . . It is, of course, desirable that each particular intrastate service should as nearly as may be pay its own way and return a profit—but the State Commission, not the ICC, has responsibility in the first instance to achieve that desired end. Passenger deficits have become chronic in the railroad industry and it has become necessary to make up these deficits from more remunerative services. The ICC has recognized this practical reality of today's railroading and it has changed its rate-fixing policy so that if interstate passenger service inevitably and inescapably cannot bear its direct costs and its share of joint or indirect costs, the ICC feels compelled in a general rate case to take the passenger deficit into account in the adjustment of interstate freight rates and charges . . . An equally broad power must be conceded to a state commission in the exercise of its primary authority to prescribe and adjust intrastate rates.

"In view of that policy we do not think that the deficit from this single commuter operation can fairly be adjudged to work an undue discrimination against the Milwaukee Road's intrastate operations *without findings which take the deficit into account in the light of the carrier's other intrastate revenues from Illinois traffic, freight and passenger.*" (Emphasis added)

Also see: *Public Service Com. of Utah v. United States*, 356 U.S. 421, 78 S. Ct. 796, 2 L. Ed. 886 (1958); *North Carolina v. United States*, 325 US 507, 89 L. Ed. 1760, 65 S. Ct., 1260 (1945); *Florida v. United States*, 282 US 194, 75 L. Ed. 291, 51 S. Ct. 119 (1931); *Atlantic C. L. R. Co. v. North Carolina Corp. Com.*, 206 US 1, 27 S. Ct. 585, 51 Law Ed. 933 (1906).

In an annotation in 10 A.L.R. 2d 1143 the following statement appears:

"The great weight of the decisions, both court and commission, is to the effect that, in considering the question whether or not a public utility company should be compelled to continue the operation of a branch line, the entire revenues of the system are to be considered, and not merely the direct return from the branch line itself; . . ."

If in determining whether to by-pass a state commission in raising passenger fares, the ICC was required to consider the carrier's other intrastate revenues from freight, then *surely the ICC must do the same thing in deciding whether to reverse a state decision and allow passenger trains to be abandoned.* This the ICC patently did not do in this case.

It seems strange indeed that the ICC as shown by the record in this case considers losses from the operation of passenger trains in granting increases in freight rates, but on the other hand refuses to consider freight profits in allowing passenger trains to be discontinued because of alleged financial losses. It was conceded by Southern at the hearing in this case that losses on passenger operations were taken into consideration by the State Utilities Commission and the ICC on occasions in granting increases in freight rates. (R. 223, 330, 361).

The appellants seek to take comfort in the legislative history surrounding the enactment of Section 13a(2). The *Chicago* and *Utah* cases, supra, involved the construction of Section 13(4) and were decided shortly prior to the time Congress was considering the Transportation Act of 1958. Prior to 1958 Section 13(4) authorized the ICC to prescribe intrastate fares if it found that the rate "causes . . . any undue, unreasonable, or unjust discrimination against interstate . . . commerce." In 1958, following the *Chicago* and *Utah* decisions, Congress amended Section 13(4) to provide that the determination could be made "(without a separation of interstate and intrastate property, revenues and expenses,

and without considering in totality the operation or results thereof of any carrier . . . wholly within any state)". This amendment has been construed to mean that a decision of the Interstate Commerce Commission will not be reversed because there is insufficient evidence of the total intrastate operations of the carrier in the record. However, when such evidence is in the record the ICC would still be required to give it consideration. *Utah Citizens Rate Assoc. v. United States*, 192 F. Supp. 12 (D. Utah 1961) affd. per curiam 365 U.S. 649, 81 S. Ct. 834, 5 L. Ed. 2d 857 (1961). Its findings must still be supported by substantial evidence "on the record considered as a whole."

Furthermore, Congress adopted Section 13a(2) at the same time Section 13(4) was amended. If Congress had intended that the ICC should not consider all relevant factors in regards to the intrastate line in discontinuance cases it would certainly have included the same language in Section 13a(2) as was added to Section 13(4) by amendment. Undoubtedly, Congress realized that the discontinuance of an intrastate train was a matter that should normally be left to the individual states and in which the ICC should intervene only for the most compelling reasons. The appellants seek to have this Court do that which Congress has refused to do and are, in effect, asking this Court to rewrite Section 13a(2). It is respectfully submitted that this Court should not write into a statute that which Congress refused to do.

At the time Section 13a(2) was enacted, many members of Congress expressed grave concern over further Federal control in this field. The fact that state regulatory agencies were better suited to exercise jurisdiction over such matters was brought out. (See supplemental views of Messrs. Williams, Roberts, Moulder, Flynt, and Loser to H.R. 12833 set out on pages 3475-3478, 1958 U.S. Code & Cong. News, Vol. 2) Congress rejected the "net loss" provision that would have authorized the discontinuance of any rail passenger service which operated at a "net loss." This provision would have achieved the same result as the parenthetical addition that appears in 13(4), and it would have enabled the ICC in this

case to permit the discontinuance on the basis used by the Hearing Examiner, namely, that the "net" deficit from the operation of this passenger service justifies removal thereof. The Congress, however, rejected this proposed change. Over the objection of some, the ICC was given limited authority in regards to the discontinuance of totally intrastate rains. However, the requisites for intervention by the ICC were explicitly set forth in language that make it abundantly clear that Congress intended this power to be exercised only under the most compelling circumstances and after considering all relevant factors.

It is of particular legal significance that the proffered "net loss" amendment was rejected (and it was rejected only after careful consideration by a conference committee of both houses of Congress following the Senate's adoption of the provision). Legislative action upon proposed amendments is one of the most available extrinsic aids in construing legislative intent. *Southerland, Statutory Construction*, 3rd Ed., Section 5015, Vol. 2, p. 506, where the following statement appears:

> . . ."Both the state and federal courts will refer to proposed changes in a bill in order to interpret the statute into which it was finally enacted. * * * Generally the rejection of an amendment indicates that the legislature does not intend the bill to include the provisions embodied in the rejected amendment. . . ."

Among the several cases cited by *Southerland* on this point is *United States v. Great Northern R. Co.*, 287 U.S. 144, 155, 77 L. Ed. 223, 53 S. Ct. 28 (1932).

Having rejected an attempt to change the law, the criteria which remain as controlling in a proceeding of this kind are: (1) The character and population of the territory served; (2) the public patronage or lack of it; (3) the facilities remaining; (4) the expense of operation as compared with the revenue from it; and (5) the operations of the carrier as a whole."

Utilities Commission v. Southern Railway Company, 254 N.C. 79, 118 S.E. 2d 25 (1961).

Applying these criteria to the facts of this case, we see:

1. The area involved lies in the industrial heart of North Carolina. The population figures speak for themselves.

2. Considering the difficulties involved, the patronage of the trains is remarkable and it is apparently increasing.

3. There will be no remaining rail passenger facilities.

4. There is a small loss regarding the passenger aspect of the line, but Southern's over-all operation on the line is profitable and contributes to the well-being of the company.

5. The over-all operations of Southern are extremely profitable and the carrier is in excellent financial condition.

As pointed out by this Court in the recent case of *Chicago, Milwaukee, St. P. & P. Railroad Co. v. Illinois*, supra, this is a situation where Congress is stepping into a role where the control is primarily that of North Carolina and the need must "clearly appear." This is totally intrastate service. North Carolina is primarily and vitally concerned as are her people and cities. There must be some over-riding reason for a Federal Regulatory Agency to step in and take control. None appears.

There is no intimation that through the years the State of North Carolina has imposed any undue or harsh burden on Southern or any other railroad. On the contrary between 1951 and 1956, of 44 requests for discontinuances of passenger service, 42 were approved by North Carolina. 1958 U.S. Code Cong. & Adm. News, Vol. 2, p. 3470.

Southern's claimed passenger loss on this line of $117,641 for 1961 does not take into consideration the revenue produc-

ed by these passengers from off-line revenues or the fact that 58% of the loss is absorbed in taxes (52% Federal, 6% State). Considering this and the fact that the railroad made $630,000 from its freight business in 1960 on this identical line and had a net profit on its entire system of $36,107,599, the loss becomes inconsequential.

In considering whether the equities of the case lie with Southern, it should be remembered that Southern leases these tracks from the North Carolina Railroad Company, owned entirely or in the main by the State of North Carolina. The lease clearly contemplates both passenger and freight service. There can be no doubt that when the North Carolina Railroad Company in 1895 entered into its lease with the Southern, the continuation of the passenger service was certainly contemplated, and this obligation formed an integral part of the consideration for the lease. To allow Southern to abandon this last passenger service while maintaining its lucrative freight operation over the same line would allow it to escape the contractual obligations imposed upon it under the lease, and its obligation to the public.

In a somewhat similar situation, Judge John J. Parker, U. S. Circuit Judge and later Chief Judge of the 4th District, had the following comments to make in affirming a decision denying a railroad application to discontinue passenger service between two towns in South Carolina.

> "Even if there were no charter obligation with respect to maintaining passenger service over this entire line of railroad, we do not think that the order of the Commission denying to the company the right to discontinue all passenger service on this portion of the line could be held arbitrary and unreasonable so as to fall under the condemnation of the due process or the equal protection clause. The State of South Carolina, for the convenience and welfare of its people, had chartered this line of railroad from Charleston to Augusta. People along the line had been served by it for over a hundred years. The discontinuance of the trains in question would leave those

on a large part of the line without the benefit of passenger service and without the benefit of the express and mail service dependent upon the operation of passenger trains. The company intends to use the Branchville-Augusta portion of the line for the hauling of freight because of its 'convenience value,' as explained by one of the witnesses. We cannot say that it was arbitrary and unreasonable for the Commission to consider the 'convenience' of the communities served and order that the company continue to maintain the customary service ordinarily afforded by railroad companies over it. . . .

"Plaintiff is, of course, interested primarily in using the road as an integral part of its great interstate system. It accordingly uses the 16-mile portion between Branchville and Charleston, runs excellent trains over it and has no idea of abandoning passenger service so far as that portion is concerned. Likewise, it proposes to use the Branchville-Augusta portion for the convenience of its system in the hauling of freight. The Commission, however, must look to the interest of the people of South Carolina, as well as to that of the railway system; and we cannot think that, in the light of the purpose for which the charter was granted, it is arbitrary and unreasonable action to require that passenger service be continued over the entire line, and not merely on the portion where operation is to the advantage of plaintiff's system. 'The primary duty of a public utility is to serve on reasonable terms all those who desire the service it renders. This duty does not permit it to pick and choose and to serve only those portions of the territory which it finds most profitable, leaving the remainder to get along without the service which it alone is in a position to give. An important purpose of state supervision is to prevent such discriminations.' *United Fuel Gas Co. v. Railroad Com. of Kentucky*, 278 U.S. 300, 49 S. Ct. 150, 152, 73 L. Ed. 390.

". . . It must be remembered that the issue before the Commission was not whether the plaintiff should be required to furnish more or less passenger service over

the portion of the line in question, *but whether it should be permitted to abandon all passenger service over it.*" (Emphasis supplied) *Southern Railway Co. v. South Carolina Public Service Commission*, 31 F. Supp. 707, 713-714.

We submit that the Court below correctly construed §13a(2) to require a consideration of all relevant factors before the ICC could order the discontinuance of a totally intrastate train. Any other construction would raise grave Constitutional questions and run contra to the intent of Congress as plainly expressed in the very language of §13a(2).

II.

THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE DECISION OF THE ICC PERMITTING THE DISCONTINUANCE OF THE TRAINS IN QUESTION WAS NOT IN ACCORDANCE WITH THE LAW AND NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

Unlike the Hearing Examiner, the District Court considered the record as a whole. While the Examiner stated that he gave consideration to the petition, the evidence introduced at the hearing, the contentions of the parties, it is clearly apparent that he did not consider ALL of the evidence. The District Court was correct in its view of the law requiring consideration of the record as a whole.

The appellees fully recognize the rule by which the Court may not review the wisdom of the Commission's findings and may not substitute its judgment for that of the Commission. They do respectfully submit, however, that the District does have the power and the duty to review the record, the entire record, in order to determine whether or not there is evidence substantial enough to support the Commission's findings and conclusions. The Court followed the proper procedure in reviewing the Commission's action, as shown in the Court's own language. (R. 656), as follows:

"Upon our examination of the entire record, in the light of the applicable principles of law, we fail to find substantial evidential facts to support the Commission's holding that the service in question constitutes an undue burden on the interstate aspects of the carrier's operations. The basic facts are not in conflict—nor is there any real conflict in the evidence offered by the parties. The question is whether there is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' *Consolidated Edison Co. of New York v. N.L.R.B.*, 305 U.S. 197, 229, 59 S. Ct. 206, 217, 83 L. Ed. 126 (1933); *Davis, Administrative Law Treatise*, Vol. 4, p. 186. We think there is not."

This Court has consistently defined the scope of the District Court's review of Commission findings and has consistently held that if the Commission's action is not in accordance with law, or if based on findings unsupported by substantial evidence on the record considered as a whole, OR if the reviewing Court, on consideration of the entire evidence is left with the definite and firm conviction that a mistake has been committed, the Commission's action is clearly erroneous and its order may be set aside as was done in this case. *Denver Chicago Transport Co. v. United States*, U.S.D.C. (D. Colo., 1960), 183 F. Supp. 785, 787; *United States v. U. S. Gypsum Company*, 333 U.S. 364, 395, 68 S. Ct. 525, 92 L. Ed. 746.

It is perfectly apparent that the Commission's facts are unsupported by substantial evidence on the record considered as a whole; that, the Commission considered only the evidence tending to support the finding and summarily dismissed and rejected, without consideration, the evidence militating against the finding.

The Examiner's unqualified acceptance of practically all of Southern's contentions on the question of public convenience and necessity are vividly illustrated by a comparison of his finding with the record, when all of the evidence on this point is considered. All of Southern's testimony bearing upon

this point dealt with statistics designed to show the little use being made of these trains. Even Southern's own principal witness, its chief statistician, admitted that his figures did not show anything with respect to the *need* of these trains. (R. 340).

The Examiner's finding and conclusion on this point are as follows:

> "That some need exists for the service of trains 13 and 16 is shown by the testimony of the opposition witnesses. Their need, however, is relatively insubstantial when viewed in the light of the density of the population of the area served and the patronage that is potentially available. Only scattered opposition appeared at the hearing in this proceeding and at the hearing held by the North Carolina Commission and most of the opposition came from Durham, with virtually none east thereof. It is obvious that the needs of these few would be insufficient to justify the institution of a new service. Conversely, it should be equally apparent that under the test of public convenience and necessity, their needs no longer justify the continuation of existing service." (R. 40).

The appellees respectfully urge that the Examiner committed gross error in treating the appellees' evidence of public convenience and necessity as "scattered opposition." We respectfully submit that merely counting the witnesses who appeared at the hearing is not the proper way to determine the question of public convenience and necessity. The appellees presented 21 protesting witnesses at the hearing before the Examiner, two of which had previously testified at the hearing before the State Commission; in addition, 16 of the protesting witnesses testified at the prior hearing as to the public convenience and necessity. (The record in the prior hearing was incorporated by the Examiner into the record in this proceeding.) This "scattered opposition" is greater than the 26 public witnesses who testified in the case of *New York Central Railroad Co., Discontinuance of Service, St. Lawrence Division*, 312 ICC 4, in which the

Commission concluded that the continued operation of eight trains was required by the public convenience and necessity. That the principal public convenience presently afforded by the trains arises from the interconnecting service at Greensboro with the north-south trains on Southern's main line so as to furnish convenient over-night sleeper service to New York and other east coast cities, is inescapable if consideration is given to the entire record. The evidence on this point is clear, it is undisputed, and it is shown at no less than 30 places in the record. (R. 135, 144, 168, 173, 183, 191, 214, 217, 222, 225, 228, 229, 377, 380, 384, 471, 480, 485, 490, 497, 502, 510, 524, 539, 543, 547, 553, 562, 580, 587, 590 and 592).

The testimony of witnesses who actually appeared and testified at the hearing with respect to their own personal need and use of these trains was undisputed and should have been given full consideration by the Examiner. Furthermore, many of these witnesses testified as to their personal knowledge of many other persons who use and need these trains. This was positive, undisputed evidence of the additional need and use of these trains, but the Examiner did not even purport to consider this evidence. His report on its face, shows that he purported to consider only the "scattered opposition" (which) *appeared* at the hearing. The testimony of the witnesses who actually appeared at the hearing and who testified from their own personal knowledge, of the use and need of these trains by others appears at more than 20 places in the record. (R. 174, 179, 184, 191, 210, 214, 229, 283, 470-471, 481, 524, 538, 553, 561, 563, 568-571, 580, 586, 589, 591 and 593). The Examiner did not even purport to consider this evidence, and we respectfully submit that his failure to do so was "clearly erroneous."

Likewise, the Examiner finds that "for most of the major communities alternate passenger service is available . . .". This finding is unsupported by substantial evidence in the record when considered as a whole. While it is true other modes of transportation are available, to some degree, many of the communities will be left without any rail passenger service; in none of the communities would there remain any

direct through-sleeper service to points on Southern's main line. Furthermore, many of the witnesses testified that the alternate passenger service suggested by Southern was inadequate to suit the needs of the area served. (R. 383, 490-491, 500, 502, 510, 543, and 592). Here again, the Examiner merely adopted Southern's unsupported contention in the face of direct, positive evidence to the contrary, all of which was dismissed by the Examiner without consideration and without an explanation of the basis for rejecting it.

The appellees, of course, realize that the administrative agency is the sole one to determine *weight* of evidence, but the law has determined that the administrative agency must give *consideration* to the *whole record. Universal Camera Corporation v. N.L.R.B.*, 340 U.S. 474, 71 S. Ct. 456, 95 L. Ed 456 (1950).

The manner in which the Hearing Examiner considered (as distinguished from weighing) the evidence on the question of the effect of the proposed discontinuance upon industrial development of the area shows clearly the Examiner's error in adopting Southern's contentions and rejecting consideration of the positive evidence against Southern's contention. The Examiner's finding on this point is as follows:

> "One witness *expressed concern* about express service to and from Elon College, *while others feared* that the discontinuance of these trains would hamper the industrial development of the area. Through oral testimony, *petitioner denied* that the presence or absence of rail passenger service has any bearing on industrial development". (Emphasis supplied). (R. 34).

The Examiner's description of Southern's evidence on this point is accurate. The petitioner (Southern) did *deny* that the presence or absence of rail passenger service has any bearing on industrial development. The only witness for Southern who testified on this question was Mr. W. R. Belfield (R. 154-164). He stated that he personally did not know of any industry lost in this area for lack of rail passenger

service. (R. 156). He stated that *he* had not had any use for these trains and that *he* had not used them in promoting industrial development. (R. 157). He made other similar statements, all of which were to the effect that he had no information on the subject, but he did not offer any positive evidence of any kind as to whether or not the discontinuance of these trains would affect industrial development and expansion. Appellees respectfully submit that Mr. Belfield's testimony is not evidence—it certainly is not substantial evidence sufficient to support Southern's contention and the Examiner's finding. Furthermore, he made the point that industries had located in the area subsequent to the discontinuance of two previous sets of trains. On cross-examination, he made the following significant statement: "At the time the industry to which (he) had referred located on the line of Trains 13 and 16 THERE WAS PASSENGER SERVICE AVAILABLE. (R. 160). (Emphasis supplied). Instead of being real evidence, Mr. Belfield's testimony, when considered in its entirety, is nothing more than a profession of ignorance on the point to which he testified. Yet his testimony forms the sole basis of the Examiner's finding and conclusion on this point.

If we look at the whole record and examine all of the evidence on the question of the effect of the discontinuance upon industrial development, we can see the gross error in law committed by the Examiner in his failure to consider this evidence. Mr. Justin Kingston, sole owner and stockholder of Kingston Mills, testified that, at the time of the hearing, his company was then building and locating a plant in Durham, one of the stations on the line involved. (R. 383). The decision as to where to locate this plant was his exclusively, as sole owner, and he testified that "what particularly attracted (him) was this train service." (R. 382). In fact, he stated that to be ". . . one of the primary reasons I located this plant here . . ." This is not opinion testimony, it is not a profession of ignorance, it is direct, positive, uncontradicted testimony which was improperly disregarded by the Examiner. One witness, Dr. Thomas Powell, a man with an investment of one million dollars in the biological

supply business in Elon, N. C., (one of the stations on this line) testified that the discontinuance of these trains might even force his business to leave North Carolina. (R. 417).

Mr. George Parks, President of Golden Belk Manufacturing Company, testified that he had personally participated in selecting a location for an expansion of his company and that one of the considerations given in making the decision was the availability of rail passenger and freight service. (R. 524).

Another witness, executive director of Durham's Committee of One Hundred, a committee formed to attract industrial development, testified that he personally interviewed prospects himself and that he had always been asked to name the significant connections and the departures of the passenger trains. (R. 580).

The appellees do not contend that the Court may re-weigh any of the above mentioned testimony, but appellees respectfully submit that the Examiner should have given full consideration to all of this testimony rather than to dismiss it with the simple statement that this positive evidence, based on personal knowledge, constituted simply an expression of concern. The Commissioners' findings concerning this evidence appears later in the Examiner's report, (R. 41) and it is patently unsupported by substantial evidence in the record, and it is directly opposite from all of the real, positive, evidence in the record. His finding is as follows:

> "While industrial expansion may, under certain circumstances, depend on rail passenger service, it would appear that industry is much more concerned about rail freight service than rail passenger facilities."

The appellees respectfully contend that the Examiner's findings are not supported by substantial evidence and that the Commission's order, based upon the Examiner's report and recommendations, is not in accordance with law and was, therefore, properly set aside by the District Court. Although the Examiner's report contains passing reference to portions

of the evidence unfavorable to Southern's position, it is abundantly clear that his findings and conclusions are not in accord with the law as it has existed since the Administrative Procedure Act (the substantial evidence rule) was amended by adding the words, ". . . on the record considered as a whole . . ." The legislative history of that amendment was discussed by the Court in the *Universal Camera* case, supra. It is clear, with this amendment, that it is not enough that evidence, when considered by itself and viewed in isolation, substantiates the findings. The importance of the requirement that consideration must be given to the evidence on the record considered as a whole is shown in the following language of the Court in the Universal Camera case:

> "Whether or not it was ever permissible for Courts to determine the substantiality of evidence supporting a labor board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitely precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."

As the Court below pointed out, the ". . . question is whether there is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' *Consolidated Edison Co. v. N.L.R.B.* 305 U. S. 197, 229, 59 S. Ct. 205, 217, 83 L. Ed. 126 (1933); *Davis, Administrative Law Treatise,* Vol. 4, p. 186. We think there is not."

Substantial evidence is such as affords a substantial basis of fact from which the fact in issue can be reasonable inferred. *N.L.R.B. v. Columbian Enameling and Stamping Company,* 306 U. S. 292 (1939).

Substantial evidence must be such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Substantial evidence must have rational probative

force; it must carry conviction; it must be more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. *Del. E. Webb Construction Company v. N.L.R.B.*, 196 F. 2d 702 (1952).

Moreover, the substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is what is meant by consideration being given to the whole record. *Universal Camera Corporation v. N.L.R.B.*, 340 U. S. 474 (1951). And the test is not satisfied by evidence which gives equal support to inconsistent inferences. *Eastern Coal Corporation v. N.L.R.B.*, 176 F. 2d 131 (1949).

What is meant by Public Convenience and Necessity? The accepted definition of these terms is stated as follows in the case of *S.A.L.R. Co. v. Commonwealth* 71 S.E. 2d 146 (Va. 1952):

> "Necessity means reasonably necessary and not absolutely imperative . . . the convenience of the public must not be circumscribed by holding the term 'necessity' to mean an essential requirement . . . It is necessary if it appears reasonably requisite, is suited and tends to promote the accommodation of the public."

The Iowa Court, in *Application of Transport, Inc. of South Dakota*, 64 N.W. 2d 313 (Iowa 1954) held that the term "convenience and necessity" implies a determination of public interest based upon the weighing of factors having relation to an adequate and efficient transportation system.

Quoting with approval from *Chesapeake & Ohio R. Co. v. Public Ser. Com. of W. Va.*, 242 U. S. 603, 37 S. Ct. 234, 61 L. Ed. 520, p. 522 (1917), the opinion continues:

> "One of the duties of a railroad doing business as a common carrier is that of providing reasonably adequate facilities for serving the public. This duty arises out of the acceptance and enjoyment of the powers and privileges granted by the state and endures so long as they

are retained. It represents a part of what the company undertakes to do in return for them, and its performance cannot be avoided because it will be attended by some pecuniary loss."

See also the following cases: *Chicago, M., St. P. & Pac. R.R. v. Illinois*, 356 U. S. 906, 2 L. Ed. 573, 78 S. Ct. 665 (1958); *Missouri Pac. v. Ry. v. Kansas, ex rel. R.R. Comrs.*, 216 U. S. 262, 54 L. Ed. 472, 30 S. Ct. 330 (1909).

What then is the public convenience and necessity to be served by this railroad?

The record viewed as a whole discloses that the two trains in question are the last remaining east-west passenger trains between Goldsboro and Greensboro, North Carolina. Until September 1954 Southern operated three pairs of passenger trains on this line. (R. 359). One pair of trains was discontinued in 1954 and another pair in 1958. (R. 157). This reduced the passenger service to trains Nos. 13 and 16 which are involved in this proceeding. The principal public convenience presently afforded by these trains arises from the inter-connecting service at Greensboro with north-south trains on Southern's main line. The pullman service furnishes convenient overnight travel to New York and other East Coast cities, allowing a full working day to the traveler and thus conserving work time. (See the reference above to 30 places in the record).

The City of Durham has the largest natural interest in the use of the trains, 46% of the passengers embarking or leaving the trains there. This city has a population of 78,302. A witness for the railroad could recall only five cities in the United States with a population in excess of 70,000 that are without rail passenger service. The discontinuance of these trains would leave Durham County (1960 population 111,995), Alamance County (1960 population 85,674), and Orange County (1960 population 42,970) without any rail passenger service. These three counties with a total population of

240,639 are located in the industrial Piedmont section of North Carolina. (R. 522-523, 528-531).

Among the witnesses testifying were:

1. Four members of the U. S. Army assigned to the Office of Ordnance Research located at Duke University testified that the continuation of the trains was necessary for the satisfactory performance of their duties (relating to anti-missile missile work). Their individual annual use of the train was fifteen to twenty trips a year. (R. 488, 495, 501, and 507).

2. Two students at Duke University testified as to their and other students' use and need of the trains. (R. 215 and 216).

3. Professors from Duke University and the University of North Carolina testified as to the need of the trains in carrying on their duties. (R. 172, 179, 182, 213, 221, 542 and 551).

4. Patients at Duke Hospital testified as to the medical necessity of the trains in getting to and from their home in New York to the hospital. (R. 227 and 228).

5. A Research Chemist from Philadelphia, Pennsylvania, testified as to his use and need for the transportation. (R. 375).

6. A textile executive from New York City whose company owns a mill in Durham testified as to his necessity for the use of the trains. (R. 381).

7. The director of Transportation for Burlington Industries, Inc., Burlington, North Carolina, testified as to the need for the trains both for employees of the company and for buyers, suppliers and technical people visiting the plants of the company. (R. 469).

8. The President of the Research Triangle Institute, a recently established nonprofit organization providing research service to corporations, governmental agencies and foundations, testified as to the use and need of the trains by his staff, and that the continued operation of the trains was extremely important to the proper functions of his organization. The Institute staff consists of 86 full time members today; it is anticipated that this figure will be 170 by the end of 1962. (R. 478).

9. The President of the Golden Belk Manufacturing Company of Durham testified as to his use and need of the train. This witness explained the necessity for train travel in the operation of his business. (R. 521).

10. The President of the Burlington Chamber of Commerce testified that rail passenger service was instrumental in the growth of Burlington and that the discontinuance of trains would seriously handicap the area. (R. 531).

11. A Burlington Executive, the President of eight different corporations, testified as to the need for the trains by himself, his buyers, and his customers.

12. The Dean of Trinity College of Duke University, who made twenty to twenty-five trips a year himself, testified as to the need and convenience of the trains. (R. 542).

13. The Secretary of the Committee on Educational Institutions of the Duke Endowment testified that his work required use of these trains. (R. 548).

14. A Professor of Physics and a Member of the Advisory Committee of Reactor Safeguards, a part of the Atomic Energy Commission, testified that his work required the use of the trains at an average rate of a trip per month. (R. 551).

15. The President of Duke University testified to his use of the trains and that of his trustees and that their continuance was a matter of convenience and necessity. (He had made five trips to New York since the first of the year.) (R. 560).

16. The General Manager of the Jack Tar Hotel in Durham testified that the continued operations of the trains serve a necessary and convenient purpose for the guests who stay at his hotel and that the removal of the trains would not only be detrimental to efforts to attract conventions to Durham, but would inconvenience those persons attending such conventions. (R. 568).

17. The Director of Durham's Committee of 100 testified as to the need of the trains in locating and retaining industry in the Durham area. (R. 576).

18. The President of the Southerland Dye and Finishing Plant in Mebane, North Carolina, testified as to his use of the trains and their need in his area. (R. 585).

19. The Office Manager of the Belk Leggett Department Store in Durham testified as to his store's need of the trains for sending buyers to New York. The buyers consist of a group of four to six people going to New York once a month, ten months out of the year. (R. 591).

20. There was evidence of the need of the service in the industrial development of the area from Justin Kingston, a New York textile executive, now building a plant in Durham to employ two hundred to three hundred employees; (R. 381) from the Director of Transportation for Burlington Industries; (R. 469) from George Watts Hill, Chairman of the Board of the Home Security Life Insurance Company and of the Durham Bank and Trust Company, and numerous others. (R. 185). In addition, one witness, Dr. Thomas Powell, a man with an investment of a million dollars in the biological supply business in Elon, North Carolina, testified that the loss of rail

passenger service might cause that business to leave North Carolina. (R. 417).

21. Evidence indicated that there are three universities in or near Durham (two in Durham, one in Chapel Hill in Orange County). A total of 14,737 students attended these institutions in 1958-9 and attendance is steadily increasing. There are eight hospitals located in or near Durham. Six are within ten minutes by ambulance or auto from the Durham railroad passenger service. The other two, Butner and Memorial Hospital are within twenty to twenty-five minutes. These hospitals treated a total of over 431,000 patients in 1959. (R. 522-523, 528-531).

22. One witness testified that the operation of the trains was a necessity and convenience to her getting her teenage daughters to and from schools in northern cities and for the purpose of transporting young women and girls to and from Durham. (R. 167).

All of the evidence outlined above is positive and is based upon the personal knowledge and actual experience of the witnesses. It shows clearly that the continued use of these trains is a necessity and a matter of convenience to the public to reach hospitals and universities and to engage in government work and industrial growth. Appellees seriously contend that this evidence is in every respect substantial and that the Commission, in failing to give it the full consideration required by the substantial evidence rule, committed gross error in law. Its order was therefore, correctly set aside.

The record shows clearly that the over-all profit of Southern Railway in 1960 for its entire system was $30,702,542 after the payment of all taxes and all operating expenses (R. 366) and its profits for 1959 was $33,126,744. (R. 363). Of the 1960 profits, $21,043,207 was paid in dividends to the stockholders of the corporation. (R. 366).

It is respectfully submitted that the argument of the

appellants fails on Southern's financial statement alone. Certainly no burden is placed upon interstate commerce when said Southern Railway has accumulated as of 1960 a surplus of $343,594,070. (R. 366). The meager losses of the Greensboro-Goldsboro passenger service compared to the accumulated profit of the Southern Railway and to its annual earnings is inconsequential. Certainly it cannot be argued that the ability of the carrier to serve interstate commerce is substantially affected by such a small loss.

It is respectfully submitted that the court below not only has the right, but is charged with the duty, of determining whether or not substantial evidence was taken into account by the Interstate Commerce Commission in arriving at its order. The law has determined that consideration must be given to the whole record, *Universal Camera Corporation v. N.L.R.B.*, 340 U. S. 474 (1951).

The burdens of a public utility must be viewed in light of the principle that a public utility cannot shut off all unprofitable service—it must continue to serve, even at a loss as to some operations when the public convenience and necessity do not permit the loss of the service. Mr. Justice Frankfurter, in *Alabama Public Service Company v. Southern Railway Company*, 341 U. S. 341, 71 S. Ct. 762, 95 L. Ed. 1002 puts it:

> "Unlike a department store or grocery store, a railroad cannot of its own free will discontinue a particular service to the public because an item of its business has become unprofitable. . . . One of the duties of a railroad doing business as a common carrier is that of providing reasonably adequate facilities for serving the public. This duty arises out of the acceptance and enjoyment of the powers and privileges granted by the State and endures so long as they are retained. It represents a part of what the company undertakes to do in return for them, and its performance cannot be avoided because it will be attended by some pecuniary loss."

The use of the words "undue" and "unjust" must mean that there are permissible burdens, that is, "due" and "just" burdens. There is an interrelation between findings (a) and (b). To make a determination, the Commission must weigh the public convenience and necessity against the burdens. As the Court below pointed out "All material factors bearing on the questions must be taken into account, the Interstate Commerce Commission must consider a fair picture." *Colorado v. United States*, 271 U. S. 153, 168-169, 46 S. Ct. 452, 456, 70 L. Ed. 878, 885. The appellees respectfully submit that the Interstate Commerce Commission did not take all material factors into account and did not weigh the public convenience and necessity against the burdens.

CONCLUSION

The judgment of the Court below should be affirmed. The Interstate Commerce Commission did err in not interpreting and applying statutory standards. The appellant failed to show by substantial evidence, (1) that the present and future public convenience and necessity permitting of the discontinuance of the operation of the trains in question, and (2) that the continuance of said trains will work an unjust and undue burden upon the interstate operations of Southern or upon interstate commerce. The findings and conclusions of the Commission are not in accordance with law and are not supported by substantial evidence on the record considered as a whole.

Respectfully submitted,

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